IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-646

BRADFORD SCHOOL BUS TRANSIT, INC., A CORPORATION, AND THE ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, A NOT FOR PROFIT CORPORATION,

Petitioners,

vs.

THE CHICAGO TRANSIT AUTHORITY, A MUNICIPAL CORPORATION, THE URBAN MASS TRANSPORTATION ADMINISTRATION, AN AGENCY OF THE UNITED STATES OF AMERICA, AND JUDITH T. CONNOR, ADMINISTRATOR OF THE URBAN MASS TRANSPORTATION ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review a judgment of that court entered on July 7, 1976. The Court of Appeals held that each of the reasons advanced by the district court in sustaining respondents' motion to dismiss were erroneous. Nevertheless, the judgment of the district court was affirmed on a theory first urged by respondent UMTA in the Court of Appeals.

OPINION BELOW.

The opinion of the district court was not reported; however, it is contained in the Appendix hereto. The opinion of the Court of Appeals is reported at 537 F. 2d 943, and it is also incorporated in the Appendix.

JURISDICTION.

The judgment sought to be reviewed was entered on July 7, 1976. A timely petition for rehearing was denied on August 9, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

The federal program for financial assistance to public transportation agencies was initiated under the Urban Mass Transportation Act of 1964,[1] 49 U. S. C. § 1601 *et seq*. That federal aid, which generally was limited to the purchase of capital facilities and equipment, was continued by reason of the enactment of the Urban Mass Transportation Assistance Act of 1970[2] and the Federal-Aid Highway Act of 1973.[3] Thereafter, Congress enacted the National Mass Transportation Assistance Act of 1974[4] which authorized, in addition to aid for capital projects, assistance to public transportation agencies in the form of subsidation of operating deficits. All of these acts are contained in Chapter 21 of Title 49 of the United States Code. The latter two statutes mandated specific protection for private school bus operators against competition at the hands of public transporta-

1. Pub. L. 88-365, July 9, 1964, 78 Stat. 302.
2. Pub. L. 91-453, October 15, 1970, 84 Stat 962.
3. Pub. L. 93-87, August 13, 1973, 87 Stat. 281.
4. Pub. L. 93-503, November 26, 1974, 88 Stat. 1566.

tion agencies which received federal financial assistance either for equipment, facilities or operating deficits. Section 164(b) of the Federal-Aid Highway Act of 1973 (hereinafter "§ 164(b)"), which is set out fully in the Appendix, provided:

> "No Federal financial assistance shall be provided . . . for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation[5] shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. . . . *A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance* . . . [for the construction or acquisition of capital facilities or equipment under the Federal-Aid Highway Act of 1968, as amended, and the Urban Mass Transportation Act of 1964, as amended]." Emphasis supplied. 49 U. S. C. § 1602a(b).[6]

So also, when Congress extended aid for operating expenses or deficits in the National Mass Transportation Assistance Act of 1974, like protection to private school bus operators against competition from public transportation agencies receiving federal aid was prescribed by the enactment of Section 3(g) of that act (hereinafter "§ 3(g)"). That section provided:

> "No Federal financial assistance shall be provided under this chapter for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators. . . . *A violation of an agreement under this subsection shall bar such applicant from receiving any*

5. The powers and duties of the Secretary have been delegated to the Urban Mass Transportation Administrator. 49 CFR § 1.50.

6. This section specifies certain conditions under which its provisions are inapplicable. Those provisions are not set out because they are not pertinent to the decisions below or to the questions presented for review.

other Federal financial assistance under this chapter." Emphasis supplied. 49 U. S. C. § 1602(g).[7]

In summary, the protection for petitioners against competition under Section 164(b) applies to public agencies, such as respondent Chicago Transit Authority, which receive financial assistance for the purchase of buses whether under the Federal-Aid Highway Act or the Urban Mass Transportation Act. The protection against such competition under Section 3(g) applies to all recipients of assistance for (1) the acquisition of facilities or equipment and (2) the operational losses of public transportation agencies.

STATEMENT OF THE CASE.

Petitioners Bradford School Bus Transit, Inc. ("Bradford") and Illinois School Transportation Association, seeking to enforce the statutory protections afforded them, brought this action for declaratory and injunctive relief against the Chicago Transit Authority ("CTA") and the Urban Mass Transportation Administration ("UMTA"). Bradford, a private school bus operator in the Chicago metropolitan area, sued in its own right and on behalf of all private school bus operators in that area. Jurisdiction was based upon the existence of a federal question. Petitioners' Second Amended Complaint was dismissed with prejudice. It was that order that the Court of Appeals "indirectly" affirmed.

Plaintiffs, in the complaint that was dismissed (A1-A8), alleged that:

1. In early 1974, CTA made application to UMTA for financial assistance in order to purchase approximately 525 passenger buses and 650 rapid transit cars ("the project").
2. On June 28, 1974, CTA's application was approved by UMTA, and by reason of that approval UMTA committed itself to provide federal financial assistance to the CTA for passenger buses and rapid transit cars.

7. *Ibid.*

3. Pursuant to the Urban Mass Transportation Act, CTA and UMTA then entered into a grant contract with respect to such assistance which, in accordance with Section 164(b) of the Federal-Aid Highway Act of 1973, specifically prohibited CTA from engaging in school bus operations in competition with private school bus operators such as petitioner Bradford.
4. Thereafter, the project was expanded, with UMTA's approval, to include the acquisition and construction of additional capital items such as buildings and rights-of-way and the purchase of additional passenger buses; and on that account UMTA bound itself to pay CTA additional amounts in federal assistance.
5. UMTA, purportedly acting under the grant and the grant contract, paid CTA approximately $1 million. Thereafter, CTA was to be paid monthly large sums of money (approximately $150 million) until the federal assistance approved had been exhausted.
6. Subsequent to the approval of the project and the execution of the grant contract, CTA engaged in school bus operations in competition with petitioner Bradford in that CTA, responding to a solicitation for bids, submitted a bid to transport school students by bus for the Board of Education of the City of Chicago. Bradford also submitted a bid to provide such services but it was not awarded the contract; and the school bus contract was awarded to CTA.
7. In performance of the Board of Education contract, CTA engaged in school bus operations which constituted a violation of Section 164(b) of the Federal-Aid Highway Act of 1973, Section 3(g) of the National Mass Transportation Assistance Act of 1974, and the grant contract.
8. UMTA and its Administrator well knew of the violation alleged; yet, UMTA failed to enforce the applicable

statutory provisions as it was required to do by law. Further, UMTA continued to provide, and the CTA continued to accept, grants of federal financial assistance, purportedly under the applicable statutes and grant contract.

9. Bradford was damaged by reason of that violation, and Bradford would suffer irreparable damage in the event CTA continued to engage in school bus operations in competition with it.

The District Court sustained the respondents' motions to dismiss, holding (1) that petitioners lacked "standing", and (2) that the challenged conduct was not subject to judicial review (A14-A15). The Court of Appeals held that the District Court committed error in each such holding (A15-A20). However, that court then almost *sua sponte* found that the doctrine of primary jurisdiction applied and that it required the judiciary to defer to the administrative expertise or "special competence" of UMTA for an initial determination by that agency as to whether or not CTA had engaged in school bus operations in competition with Bradford (A20-A22).

QUESTIONS PRESENTED.

In this case it cannot be disputed that the only matters to be decided by the district court involve:

1) The meaning of the terms or phrases "school bus operations", "competition", and "shall bar"; and
2) The determination of whether CTA's activities, proposed and accomplished, constitute school bus operations in competition with petitioners.

That being the case, should the judicial power of the district court, which decidedly was properly invoked under Article III on matters subject to its exercise, be discontinued on the assumption that UMTA is better equipped than a United States District Court to (1) understand the plain language that is employed in the statutes and (2) decide whether CTA is in competition with private school bus operators?

Related to that question, is the further question of whether such a deference of the judicial power should be effected where, as here, the mechanism and procedures for the administrative determination required by the holding of the Court of Appeals were not in existence at the time petitioners brought their action, and those procedures are plainly inconsistent with the congressional mandate incorporated in sections 3(g) and 164(b)?

REASON FOR GRANTING THE WRIT.

The Decision Below Effectively Denies a Citizen the Right to Invoke the Federal Judicial Power in a Case Where That Citizen Has Standing to Challenge Reviewable Action, for the Court of Appeals Wrongfully Applied the Doctrine of Primary Jurisdiction Under Circumstances Which Are Wholly at Variance with the Rationale Behind That Doctrine as Prescribed by Decisions of the Supreme Court in Far East Conference v. United States (1952); United States v. Western Pacific Railroad Co. (1956); and Nader v. Allegheny Airlines, Inc. (1976).

In this case, petitioner Bradford, a private school bus operator, seasonably invoked the protection afforded to it by Congress in the several mass transportation assistance acts referred to above so as to prevent the destruction of its business by reason of competition from a public transportation agency—the CTA—whose capital requirements and operating deficits were to a material extent being subsidized by federal monies. Unquestionably, when petitioners' action was commenced, there was no administrative "remedy" available to them nor were any such administrative procedures adopted until more than one

year after the case was filed.[8] Indeed, the "procedures" of UMTA, to which the Court of Appeals relegates Bradford, were not adopted until after this case was argued before the Court of Appeals.

The impact of the decision below is that, after prosecuting this claim in the federal courts for a year and a half, Bradford has now been told by the Court of Appeals to start all over again before the administrative agency. That is particularly unjust here, because Bradford must now challenge the actions of CTA, that were condoned by UMTA, before UMTA.

We are not aware of any action whatsoever, with respect to the matters described in the complaint, that UMTA has taken since this case was filed in February, 1975. Moreover, Bradford's allegation in paragraph 19 of the complaint that UMTA was aware of CTA's violations of the statutes and the grant contract, yet it failed, despite its duty so to do, to enforce in any way the statutes against CTA[9] has not been controverted in any paper of which we are aware or which has been filed below.

The "procedures" that UMTA has adopted demonstrate that UMTA has determined to abrogate the statutory protection afforded school bus operators, for its "post Bradford procedures" (as explicitly recognized by the Court of Appeals) clearly change

8. UMTA's action in establishing a mechanism of administrative processing of complaints are of doubtful validity on their face and as applied to the facts of this case, because, *inter alia,* the administrator is not required to conduct a hearing and the administrator has abrogated to himself, contrary to the unequivocal words of the statutes, the decision of what sanction should be imposed for a statutory violation where the statute admits of no such administrative discretion. Federal Register (April 1, 1976) Vol. 41, No. 64. 49 C. F. R. §§ 605.30-.35. Cf. *Shea* v. *Vialpando,* 416 U. S. 251, 261-266 n. 11 (1974); *Townsend* v. *Swank,* 404 U. S. 282, 286-292 (1971); *King* v. *Smith,* 392 U. S. 309, 333 n. 34 (1968).

9. Paragraph 19 of the complaint is as follows:

> "19. Defendant UMTA and Defendant Connor were well aware of such violations. Notwithstanding such knowledge, Defendant UMTA and Defendant Connor have failed to enforce such statutory and contractual provisions as they are required to do by law and said defendants have made and propose to make further grants of money contrary to law to Defendant CTA with respect to Project No. IL-03-0040." (A. 7).

the congressional sanction prescribed for violations (mandatory loss of further federal assistance), for the regulations provide:

§ 605.33: (a) After reviewing the results of such investigation, including hearing transcripts, if any, and all evidence submitted by the parties, the Administrator will make a written determination as to whether the respondent has engaged in school bus operations in violation of the terms of the agreement.

(b) If the Administrator determines that there has been a violation of the agreement, he will order such remedial measures *as he may deem appropriate.*

* * * * *

§ 605.34: If the Administrator determines, pursuant to this subpart, that there has been a violation of the terms of the agreement, *he may bar a grantee or operator from the receipt of further financial assistance* for mass transportation facilities and equipment. Emphasis supplied. 49 C. F. R. § 605.33 and .34, at A9-A10 (April 1, 1976).

Lastly, UMTA's "procedures" do not even require its administrator to hold a hearing of any type on the wrongdoing alleged by Bradford. 49 C. F. R. § 605.32, at A9-A10. We respectfully submit that the type of reasoning employed by the Court of Appeals in this case does little to assure a citizen of the effectiveness of the federal courts.

But apart from the basic injustice imposed below upon the petitioners, there can be no question that the Court of Appeals' application of the doctrine of primary jurisdiction is flatly wrong as a matter of law, for it is in conflict with the decisions of this Court which formulated and interpreted the doctrine of primary jurisdiction. The articulation of "primary jurisdiction" below appears in two paragraphs at the conclusion of the opinion of the Court of Appeals. Exclusive of the quotation which there appears from *Far Eastern Conference* v. *United States,* 342 U. S.

570 (1952), it is plain that asserted reasoning of the Court of Appeals has been gleaned almost verbatim from the language appearing in the opinions of two district judges. Compare Opinion Below with *Eisman* v. *Pan American World Airlines*, 336 F. Supp. 543 (E. D. Pa. 1971), at 547-548, and *Feliciano* v. *Romney*,[9] 363 F. Supp. 656 (S. D. N. Y. 1973) at 674. As is the case with *Far Eastern Conference, supra*, we have no quarrel with the reasoning of those district courts in their application of the doctrine of primary jurisdiction to the issues there at hand. Indeed, we think that each District Judge reached the right result because "primary jurisdiction", or initial deference to administrative expertise where the issues relate to matters "not within the conventional experience of judges", *Far Eastern Conference, supra*, p. 574, was applied to an appropriate factual issue in each case—*Far Eastern Conference* (propriety of "dual system" of freight rates for overseas ocean shipments), *Eisman* (whether student and youth international airline fares were discriminatory under the Federal Aviation Act), and *Feliciano* (reasonableness of comprehensive urban redevelopment plan under the Model Cities Act).

What happened below was that the Court of Appeals failed to recognize a recent decision of this Court which clearly delineates the generic circumstances under which the doctrine of primary jurisdiction plainly **does not** apply. In *Nader* v. *Allegheny Airlines, Inc.*, 96 S. Ct. 1978 (1976), plaintiff Nader challenged, as fraudulent misrepresentations under a common-law tort theory, the over-booking practices of a commercial airline. The defendants there suggested, and the Court of Appeals for the District of Columbia agreed, that Nader's claim should be first referred to the Civil Aeronautics Board to determine whether or not the challenged practices were "deceptive" within the meaning of the Federal Aviation Act of 1958, 49 USC § 1381. Mr. Justice Powell, speaking for a unanimous

9. No appeal was prosecuted in either *Eisman* or *Feliciano*, and these decisions have never been cited in an appellate decision except in the instant case.

court, thoroughly reviewed each of the viable decisions concerning "primary jurisdiction"; and, while distinguishing the results in *Far Eastern Conference, supra*, and *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 (1956) but relying upon the decisions' rationale, it was found that under certain circumstances judicial abdication or deference to administrative expertise was wholly inappropriate. It was there said:

> "The doctrine of primary jurisdiction 'is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.' *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63, 77 S.Ct. 161, 165, 1 L.Ed. 2d 126, 132 (1956). Even when common-law rights and remedies survive and the agency in question lacks the power to confer immunity from common-law liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure '[u]niformity and consistency in the regulation of business entrusted to a particular agency' or where
>
> > 'the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.'
>
> *Far East Conference* v. *United States*, 342 U.S., at 574-575 . . . [additional citations].
>
> "The doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency, *e.g.*, *Danna* v. *Air France*, 463 F.2d 407 (C.A.2 1972); *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 417-418, . . . (1959), particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency—such as matters turning on an assessment of industry conditions, *e.g.*, *United States* v. *Western Pacific R. Co., supra*, 352 U.S. at 66-67. . . .

In this case, however, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Board.

"Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or Board regulation applicable to disclosure practices. Petitioner also makes no challenge, comparable to those made in *Southwestern Sugar & Molasses Co.* v. *River Terminal Corp., supra,* and *Lichten* v. *Eastern Airlines, Inc.,* 189 F.2d 939 (C.A.2 1951), to limitations on common-law damages imposed through exculpatory clauses included in a tariff.

"Referral of the misrepresentation issue to the Board cannot be justified by the interest in informing the court's ultimate decision with 'the expert and specialized knowledge,' *United States* v. *Western Pacific R. Co., supra,* at 64, . . ., of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." *Nader* v. *Allegheny Airlines, Inc.,* 96 S. Ct. 1978, 1987-1988 (1976).

That is exactly the situation here. Indeed, this is even a plainer case for not invoking primary jurisdiction, for, as we have demonstrated above, the only real issue that the district court will be required to decide is:

> Did CTA compete with Bradford in conducting school bus operations?

Plainly, it would be ludicrous to suggest that the concepts of competition and the operation of school busses are not within the conventional knowledge of the federal district courts, for terms identical to those have been routinely construed and applied by federal judges for more than a century.

One might feel that the firm sanction imposed by Congress in the event of unlawful competition by a federally subsidized mass transportation operator may have been the root of Bradford's unsuccess below; but that was not the issue there nor is it the issue here, for Bradford's principal prayer for relief was for a declaration that CTA was in violation of the applicable statutes and the grant contract. What Bradford and the Illinois School Transportation Association seek is that CTA stop competing with them, for petitioners do not have the luxury of submitting bids for business well knowing that their operating deficits and their failures to husband their resources so as to replace their capital equipment and facilities will be cured by the arrival of federal monies. In short, if CTA wishes to go into the school bus business, it should do so under the same economic considerations and face the same economic consequences as do the petitioners in this case. But CTA should not have it both ways, nor should UMTA permit it to do so.

PRAYER FOR WRIT OF CERTIORARI.

For the reasons stated, petitioners respectfully pray that this Court issue its Writ of Certiorari so as to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: November 5, 1976.

APPENDIX

APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

BRADFORD SCHOOL BUS TRANSIT, INC., a corporation, on behalf of itself and all persons engaged in operations similar to its operations in the counties of Cook, DuPage, Kane, Lake, McHenry and Will, Illinois, and THE ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, a not for profit corporation, on behalf of such persons, *Plaintiffs,* *vs.* THE CHICAGO TRANSIT AUTHORITY, a municipal corporation, the URBAN MASS TRANSPORTATION ADMINISTRATION, an agency of the United States of America, and JUDITH T. CONNOR, Administrator of the Urban Mass Transportation Administration, *Defendants.*	No. 75 C 694

SECOND AMENDED COMPLAINT.

Plaintiff Bradford School Bus Transit, Inc., a corporation, on behalf of itself and all persons engaged in school bus operations in the counties of Cook, DuPage, Kane, Lake, McHenry, and Will, Illinois, and Plaintiff Illinois School Transportation Association, a not for profit corporation, on behalf of said per-

sons, by their attorneys, complain of the Defendants The Chicago Transit Authority, a municipal corporation, the Urban Mass Transportation Administration, an agency of the United States of America, and Judith T. Connor, Administrator of the Urban Mass Transportation Administration, and allege:

JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. The matter in controversy herein exceeds the sum or value of $10,000, exclusive of interest and costs. This action is initiated under the Federal Declaratory Judgments Act, 20 United States Code, Section 2201; under the Federal-Aid Highway Act of 1973, 49 United States Code, Section 1602a; and under the Urban Mass Transportation Act of 1964, as amended, 49 United States Code, Section 1602.

PLAINTIFFS AND THE CLASS

2. Plaintiff Bradford School Bus Transit, Inc. now is, and has been at all times pertinent to the allegations in this Complaint, a corporation duly licensed to do business in the State of Illinois, and is a private bus operator engaged in school bus operations in the State of Illinois.

3. Plaintiff Bradford School Bus Transit, Inc. brings this action in its own behalf and on behalf of all other private bus operators engaged in school bus operations in the counties of Cook, DuPage, Kane, Lake, McHenry, and Will, Illinois, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiff Illinois School Transportation Association likewise brings this action on behalf of said persons.

4. The membership of the class upon whose behalf Plaintiffs bring this action is so numerous that joinder of all members therein is impracticable; there are questions of fact and law common to said class; and the claims of Plaintiff are typical of the

claims of the class. Plaintiff will fairly and adequately protect the interests of the class.

5. The prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of other members not parties to the adjudications and would materially impair and impede their ability to protect their interests. Further, defendants, and each of them, have refused to act on grounds generally applicable to the class, and thereby injunctive relief is appropriate.

DEFENDANTS

6. Defendant Chicago Transit Authority (herein sometimes "CTA") is a municipal corporation which exists by reason of the Metropolitan Transportation Act, Ill. Rev. Stat. (1973), Chapter 111⅔, Section 301 *et seq.* It furnishes urban mass transportation services and facilities in the Chicago metropolitan area.

7. Defendant Urban Mass Transportation Administration is an agency of the United States of America which agency exists by reason of the Urban Mass Transportation Act of 1964, 49 U. S. C. sec. 1601, *et seq.* Defendant Judith T. Connor is the Administrator of the Urban Mass Transportation Administration ("UMTA"). UMTA is engaged in furnishing federal funds to persons operating urban mass transportation services and facilities.

8. Defendants, and each of them, are joined as parties under Rule 20(a) of the Federal Rules of Civil Procedure. Plaintiffs assert against them a right to relief arising out of the same facts and transactions. Questions of law and fact common to all will arise in this action.

THE CAUSE OF ACTION

9. Purportedly acting under the provisions of the Urban Mass Transportation Act of 1964, as amended, 49 United States Code, Section 1601 *et seq.*, defendant CTA has caused to be made on its behalf numerous applications for grants of monies from the defendant Urban Mass Transportation Administration from 1966 through the date of the filing of this Complaint. By reason thereof defendant CTA has become cognizant of each of the requirements attendant to such applications, grant contracts and grants.

10. In early 1974, defendant CTA made application for a grant of funds from defendant UMTA so as to (1) finance Phase Two of its "1972-1976 Capital Development Program" and (2) enable it to purchase approximately 525 passenger buses and 650 rapid transit cars and equipment. That application for grant was assigned the project number IL-03-0040. On or about June 28, 1974, defendant UMTA approved said application for grant, and by reason thereof defendant UMTA undertook to pay to defendant CTA the sum of $70 million.

11. Thereafter, defendant CTA requested that Project No. IL-03-0040 be amended so as to obtain funding for additional capital development projects including, but not limited to, the acquisition of additional passenger buses; the construction of facilities at bus garages, fuel storage tanks, and parking lots; the acquisition of real estate; the purchase of engineering, design and appraisal services; the rehabilitation and renovation of rights-of-way; and the purchase and installation of auxiliary equipment. Plaintiffs are informed and believe that such amendment was approved by defendant UMTA in 1975. By reason of the foregoing, defendant UMTA has committed itself to pay to the defendant CTA $150 million.

12. From and after the approval of Project No. IL-03-0040, as aforesaid, defendant UMTA transferred to defendant CTA, pursuant to the provisions of the grant and the grant contract

hereinafter described, approximately $1 million. Plaintiffs are informed and believe that defendant CTA will make monthly applications for large sums of monies pursuant to said grant and grant contract until the total amount of monies available for distribution under said grant have been exhausted.

13. Section 164(b) of the Federal Aid Highway Act of 1973, 49 United States, Section 1602a(b), 87 Stat. 250 provides in pertinent part as follows:

> "No Federal financial assistance shall be provided under . . . this chapter, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators . . . .A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance. . . ."

Likewise, the Urban Mass Transportation Act of 1964, as amended, 49 United States Code, Section 1602(g), 88 Stat. 1565 provides in pertinent part as follows:

> "(g) No Federal financial assistance shall be provided under this Act for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators . . . A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under this Act."

14. Subsequent to the approval of application for grant No. IL-03-0040, defendants CTA and UMTA entered into a grant contract with respect thereto. The contract provided, in pertinent part, as follows:

"Sec. 1. *Purpose of Contract*—The purpose of this Contract is to provide for the undertaking of an urban mass transportation capital improvement project (herein called the "Project"), with Government financial assistance to the Public Body [CTA] in the form of a capital grant (herein called the "Grant"), under the Urban Mass Transportation Act of 1964, as amended, (herein called the "ACT"), and to state the terms and conditions upon which such assistance will be provided and the manner in which the Project will be undertaken and completed and the Project facilities and equipment used.

Sec. 2. *The Project*—The Public Body [CTA] agrees to undertake and complete the Project, and to provide for the use of Project facilities and equipment, substantially as described in its Application, herewith incorporated by reference, filed with and approved by the Government, and in accordance with the terms and conditions of this Contract."

* * * * *

"Sec. 9. *Special Conditions*

* * * * *

B. The Public Body agrees that it, or the operator of Project equipment, will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. . . ."

The defendants, and each of them, are possessed of the application for grant, as amended, and the grant contract. Therefore, copies thereof are not hereto attached.

15. In December 1974, the Board of Education of the City of Chicago solicited bids for the purpose of providing bus transportation for students enrolled in schools operated by it. The school bus transportation services which are the subject of such solicitation for bids required the employment of numerous buses.

16. Defendant CTA, notwithstanding the foregoing statutory and contractual provisions with which it was required to comply, submitted a bid to perform such services. The Plaintiff

Bradford School Bus Transit, Inc. also submitted a bid to provide the identical services.

17. In January 1975, defendant CTA and the Board of Education of the City of Chicago, pursuant to said solicitation for bids, entered into an agreement whereby defendant CTA would engage in school bus operations as that term is used and intended to mean in the aforesaid statutory provisions. Since at least as early as January 1975, defendant CTA, notwithstanding the foregoing statutory and contractual provisions, has engaged in such school bus operations.

18. By reason of such engagement in school bus operations, defendant CTA has knowingly and intentionally violated:

(a) Federal-Aid Highway Act of 1973, 49 United States Code, Section 1602(a);

(b) Urban Mass Transportation Act of 1964, as amended, 49 United States Code, Section 1602;

(c) The grant contract with respect to Project No. IL-03-0040.

19. Defendant UMTA and Defendant Connor were well aware of such violations. Notwithstanding such knowledge, Defendant UMTA and Defendant Connor have failed to enforce such statutory and contractual provisions as they are required to do by law, and said defendants have made and propose to make further grants of money contrary to law to Defendant CTA with respect to Project No. IL-03-0040.

20. By reason of the foregoing violations, Bradford School Bus Transit, Inc. and the class it represents have suffered irreparable damage in a material amount, and such plaintiff and the class it represents will continue to suffer irreparable damage in the future by the wrongful conduct of the defendants UMTA, Connor, and CTA, as aforesaid, and by similar conduct which Plaintiff is informed and believes said defendants propose to engage in.

Wherefore, Plaintiffs pray as follows:

(A) For a declaratory judgment finding that the defendants, and each of them, have been and are in violation of the foregoing statutes and the grant contract;

(B) For a preliminary and permanent injunction restraining and barring the defendant Connor, defendant UMTA, and defendant CTA from paying or receiving any further financial assistance under the provisions of the Urban Mass Transportation Act, as amended.

(C) For such further relief in the premises as the Court shall determine meet.

/s/ JAMES J. FLYNN,
One of the Attorneys for the Plaintiffs.

JAMES J. FLYNN,
GEORGE P. LYNCH,
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822-9160.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

BRADFORD SCHOOL BUS TRANSIT, INC., etc., et al.,
Plaintiffs,
vs.
CHICAGO TRANSIT AUTHORITY, etc., et al.,
Defendants.
No. 75 C 694

MEMORANDUM OPINION AND ORDER.

The plaintiffs, Bradford School Bus Transit, Inc., and the Illinois School Transportation Association, have brought this action for a judicial declaration that the defendants, the Chicago Transit Authority (CTA), the Urban Mass Transportation Administration, and the administrator thereof, Judith T. Connor (Federal defendants), are operating in violation of Federal law and for an injunction against the paying or receiving of Federal financial assistance. Both the CTA and the Federal defendants have moved for dismissal on various grounds.

The Federal statutes of which the defendants are allegedly in violation are the Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a and the Urban Mass Transportation Act of 1964, as amended, 49 U. S. C. § 1602. The pertinent sections of each prohibit the furnishing of Federal financial assistance to any applicant "unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators." The statutes do not apply unless private school bus operators "are able to provide

adequate transportation, at reasonable rates, and in conformance with applicable safety standards."

The CTA, as a condition to receiving financial assistance from the Federal defendants, entered into an agreement as described in the statutes in January, 1975. The plaintiffs allege that the CTA has been operating school buses in violation of that agreement since. The relief sought is an injunction against the Federal defendants paying or the CTA receiving any further assistance.

The defendants challenge the standing of the plaintiffs to bring this action. In *South Suburban Safeway Lines, Inc.* v. *City of Chicago*, 416 F. 2d 535 (7th Cir. 1969), the Court of Appeals held that a private bus company lacked standing to challenge the Urban Mass Transportation Administration's choice of projects under broad statutory guidelines, even though the plaintiff was adversely affected by competition from the recipient of Federal assistance. *South Suburban Safeway Lines* is controlling authority in the case at bar.

The cases cited by the plaintiffs, *Association of Data Processing Service Organization, Inc.* v. *Camp*, 397 U. S. (1970), and *Barlow* v. *Collins*, 397 U. S. 159 (1970), are distinguishable in that the relief sought in these cases was not precluded by statutory commitment to agency discretion of the action sought as relief. In the instant case, the plaintiffs seek to have a Federal agency exercise its discretion in favor of terminating assistance to the CTA, which action might or might not result in the withdrawal of the CTA from competition with the plaintiffs.

By legislating that the U. M. T. A. and assistance applicants enter into an agreement as to non-competition with private school bus operators, the Congress clearly committed the decision as to whether a breach has occurred and whether or not to act on that breach to the agency's discretion. By this device, Congress clearly precluded judicial review. To hold that a

non-party to the agreement has standing to challenge the U. M. T. A.'s actions as a result of an alleged breach of the agreement would be an impermissible usurpation by this Court of authority delegated to an agency of the Executive Branch of our government.

Accordingly, the defendants' motions to dismiss are granted.

ENTER:

/s/ FRANK J. MCGARR,
Frank J. McGarr,
United States District Judge.

Dated: September 4, 1975.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 75-1958

BRADFORD SCHOOL BUS TRANSIT, INC., et al.,
Plaintiffs-Appellants,

v.

CHICAGO TRANSIT AUTHORITY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 75 C 694
FRANK J. MCGARR, *Judge*

ARGUED FEBRUARY 19, 1976—DECIDED JULY 7, 1976

Before HASTINGS, *Senior Circuit Judge*, SPRECHER and TONE, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal concerns a class action for declaratory and injunctive relief brought by Bradford School Bus Transit Incorporated ("Bradford") and the Illinois School Transporation Association ("ISTA"), against the Chicago Transit Authority ("CTA"), the Urban Mass Transportation Administration ("UMTA") and Judith T. Connor, Administrator of the Urban Mass Transportation Administration. The questions presented here are whether private school bus operators have standing to challenge the actions of the Urban Mass Transportation Administration and if so, whether those actions are judicially reviewable.

I.

In June 1974, in accordance with the terms of the Urban Mass Transportation Act (("Act"), 49 U.S.C. §§ 1601 *et seq.*, UMTA entered into a grant contract with the CTA to provide financial assistance for purchasing passenger buses, rapid transit cars and related equipment, Project No. IL-03-0040. Pursuant to Sections 1602(g) and 1602a(b) of the Act, the grant contract included a provision which under certain conditions specifically prohibited the CTA from engaging in school bus operations in competition with private bus operators.[1] UMTA

1. The Urban Mass Transportation Act of 1964 *as amended*, 49 U.S.C. § 1602(g) reads as follows:

> (g) *No Federal financial assistance shall be provided under this chapter for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators.* This subsection shall not apply to an applicant with respect to operation of a schoolbus program if the applicant operates a school system in the area to be served and operates a separate and exclusive schoolbus program for this school system. This subsection shall not apply unless private schoolbus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards; and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting schoolchildren and personnel along with facilities to be used therefor) was so engaged in schoolbus operations any time during the twelve-month period immediately prior to November 26, 1974. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under this chapter. (Emphasis added.)

The Federal-Aid Highway Act of 1973, 49 U.S.C. § 1602a(b), a virtually identical provision, provides:

> (b) No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, Title 23, (2) paragraph (4) of subsection (e) or section 103, Title 23, or (3) this chapter, for the purchase of buses to any applicant for

(Continued on next page)

later agreed to provide additional financial assistance to the CTA and the project was expanded to include the acquisition and construction of additional capital items.

Shortly thereafter, in December 1974, the Chicago Board of Education solicited bids from various bus companies for the transportation of students attending the Chicago Public Schools. Plaintiff Bradford and defendant CTA submitted bids to provide those services. The CTA's bid was accepted and it has been providing bus transportation for Chicago school children since January 1975.

Plaintiffs then brought this suit individually and on behalf of all private school bus operators in CTA's service area seeking a declaration that the CTA is engaged in school bus operations in violation of the Act and of the grant contract. They also sought to enjoin UMTA from providing further financial assistance to the CTA. The district court, granting a defense motion, dismissed plaintiffs' complaint for lack of standing and concluded that UMTA's action was not subject to judicial review. Plaintiffs now appeal from that order.

(Continued from preceding page)

such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. This subsection shall not apply to an applicant with respect to operation of a school bus program if the applicant operates a school system in the area to be served and operates a separate and exclusive school bus program for this school system. This subsection shall not apply unless private school bus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards, and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to August 13, 1973. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (2), and (3) of this subsection.

II.

We shall first consider the issue of plaintiffs' standing. In dismissing the plaintiffs' complaint for lack of standing, the district court relied solely upon *South Suburban Safeway Lines, Inc.* v. *City of Chicago*, 416 F.2d 535 (7th Cir. 1969). In *South Suburban, a* private bus company sought to challenge a grant to the CTA for a proposed extension of its rail operations which had been authorized by UMTA. Section 1602(c) of the Act, (now §1602(e)) prohibited UMTA from providing financial assistance to a public transit corporation for the purpose of acquiring or operating in competition with a private transit corporation, unless, among other things, the Secretary of Transportation found this operation to be essential to a coordinated urban transportation system. In that case we held that the company lacked standing to complain. In our view, the district court's reliance on *South Suburban* was misplaced.

The Administrative Procedure Act grants standing to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. The Supreme Court has reviewed the question of standing to challenge agency action with respect to this provision. In *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968), which involved a section of the TVA Act designed primarily to protect against TVA competition, the Court held that the plaintiff, Kentucky Utilities Co., had standing to sue and stated:

> [I]t has been the rule, at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. *See Alton R.R.* v. *United States*, 315 U.S. 15, 19 (1942); *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83 (1958).

Id., at 6. And, as Justice Douglas observed in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970):

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend.

In *Data Processing*, which held that an association of data processors had standing as competitors, to challenge a regulation of the Federal Comptroller which permitted national banks to provide data processing services, the Court announced a two-prong test for standing:

> . . . whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise . . . [and] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Id., at 152-153.[2]

We are convinced that the test employed by the Supreme Court in *Data Processing* is controlling in the instant case. First, plaintiffs here have a personal stake and interest in the litigation which amounts to an injury in fact under U.S.C. § 702. Plaintiffs have alleged that they have been adversely affected by the CTA's operation of school bus services. Specifically, plaintiff Bradford has alleged that the CTA, an illegal competitor, was awarded a contract to provide school bus services for which Bradford had bid. Secondly, plaintiffs as private bus operators clearly fall within the zone of interests to be protected by the statute. In fact, plaintiffs represent the only parties to be protected by the statutory provision. As defendant UMTA concedes in its brief, the purpose of 1602(g)

2. *Accord, Barlow* v. *Collins*, 397 U.S. 159 (1970); *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Apter* v. *Richardson*, 510 F.2d 351 (7th Cir. 1975); *Cotovsky-Kaplan Physical Therapy Association, Ltd.* v. *United States*, 507 F.2d 1363 (7th Cir. 1975).

and 1602(b) is to protect private school bus companies from competition by federally funded public transit systems. That intent is clearly reflected in the language of both sections 1602(g) and 1602a(b) which provide in pertinent part that:

> [Unless certain exceptions apply] [n]o Federal financial assistance shall be provided . . . to any applicant . . . unless such applicant . . . [agrees] not [to] engage in school bus operations in competition with private school bus operators. . . . A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under this chapter.

Therefore, we conclude that plaintiffs have satisfied the two-prong test enunciated in *Data Processing* and thus have standing to bring this action.

III.

Having determined that plaintiffs have standing, we now turn to the issue of whether UMTA's actions are judicially reviewable. The district court, in dismissing plaintiffs' complaint considered this question and concluded:

> By legislating that the U.M.T.A. and assistance applicants enter into an agreement as to non-competition with private school bus operators, the Congress clearly committed the decision as to whether a breach has occurred and whether or not to act on that breach to the agency's discretion. By this device, Congress clearly precluded judicial review.

Defendants urge us to follow the reasoning of the district court.

In order to determine whether judicial review of UMTA's action is required, we must analyze Section 701(a) of the Administrative Procedure Act and the relevant case law. Section 701(a) reads:

> (a) This chapter applies, according to the provision thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

In the instant case, the statutory provisions do not expressly preclude judicial review. Consequently, we must closely examine the statutory scheme and consider whether judicial review is precluded by inference. Justice Douglas' remarks in *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970) are most helpful:

> As we said in *Data Processing Service*, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. *See Leedom* v. *Kyne*, 358 U.S. 184; *Harmon* v. *Brucker*, 355 U.S. 579; *Stark* v. *Wickard*, 321 U.S. 288; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94. Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, we held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297. It is, however "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories* v. *Gardner, supra*, at 141. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review of the statutory objectives might not be realized. See the *Chicago Junction Case*, 264 U.S. 258; *Hardin* v. *Kentucky Utilities, supra*.

And as this court pointed out in *Cotovsky-Kaplan Physical Therapy Association, Ltd.* v. *United States*, 507 F.2d 1363, 1368 (7th Cir. 1975) ". . . the stringent standards set forth in *Data Processing* [must be met] before a Congressional intent to preclude judicial review . . . can be found." In the instant case, as we have indicated, plaintiffs are clearly members of the class of persons which Congress intended to protect and it follows that their interests should be safeguarded in the

courts. Furthermore, there is no clear and convincing evidence of a Congressional intent to foreclose review.

Nor are we convinced that the statutes commit UMTA's action solely to its discretion by law. The mere inclusion of a contract mechanism and UMTA's discretion with respect to breaches is insufficient to preclude review. In *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 934 (2d Cir. 1968) which involved plaintiffs who sought to assert rights guaranteed them under certain housing acts subject to grant contracts between HUD and the Redevelopment Agency, the court stated:

> It has been suggested to us that since section 105(c) only provides that the relocation requirements be included in loan or capital grant contracts, the requirements are merely contract rights possessed by the federal government, which cannot be enforced by displacees. This is a proposition we cannot accept, for much more is involved here than a narrow issue of contract rights. As we have already said, the fact that Congress intended to protect the specific interests of displacees when it enacted the section is enough to give the displacees standing, in the absence of a persuasive reason to believe that Congress intended to cut off judicial review. . . . That Congress provided for enforcement of the relocation provisions through contracts with the local agencies does not weaken the appropriateness of judicial review, for such a method of enforcement is natural where Congress is specifying what requirements local agencies must meet in order to receive federal aid. The possibility that an administrative agency, charged with enforcing a requirement established by Congress in the public interest, will not adequately perform the task is equally great whether enforcement is through contract or through direct regulation. Accordingly, the reasons for allowing those who have a direct, personal interest in furthering the Congressional purpose to seek judicial review of administrative action are as compelling in one situation as in the other.

Finally, we believe it is significant that the rules and regulations issued by the Urban Mass Transporation Administrator

on March 29, 1976 specifically provide for judicial review of administrative actions regarding school bus operations after certain procedures have been exhausted. FED. REGISTER, Vol. 41, No. 64, 49 C.F.R. §§ 605.30-35 (April 1, 1976).

IV.

Although we are convinced that Congress did not intend to preclude judicial review of UMTA's actions, we refrain from further review of plaintiff's claim and defer to the primary jurisdiction of UMTA. UMTA has recently established complaint procedures and remedies available to interested parties "alleging a violation or violations of terms of an agreement" entered into "pursuant to" an UMTA grant.[3] We are mindful that these procedures were not in effect at the time plaintiffs' complaint was filed. Nonetheless, we think that UMTA's actions cannot be reviewed until plaintiffs exhaust these administrative remedies.

3. The rules and regulations governing school bus agreements were issued March 29, 1976, approximately one year after plaintiffs filed suit. Subpart D which provides for complaint procedures and remedies states as follows:

§ 605.30: Any interested party may file a complaint with the Administrator alleging a violation or violations of an agreement entered into pursuant to § 605.14. A complaint must be in writing; must specify in detail the action claimed to violate the agreement, and must be accompanied by evidence sufficient to enable the Administrator to make a preliminary determination as to whether probable cause exists to believe that a violation of the agreement has taken place.

§ 605.31: On receipt of any complaint under § 605.30, or on his own motion if at any time he shall have reason to believe that a violation may have occurred, the Administrator will provide written notification to the grantee concerned (hereinafter called "the respondent") that a violation has probably occurred. The Administrator will inform the respondent of the conduct which constitutes a probable violation of the agreement.

§ 605.32: The Administrator will allow the respondent not more than 30 days to show cause by submission of evidence,

(Continued on next page)

The doctrine of primary jurisdiction is concerned with promoting proper relationship between courts and administrative agencies. It applies where a claim is originally cognizable in the courts whenever enforcement of that claim requires resolution of issues, which under a regulatory scheme, have been placed within the special competence of an administrative body. "In such a case the judicial process is supended pending referral of such issues to the administrative body for its views." *Eisman* v. *Pan American World Airlines*, 336 F. Supp. 543, 547 (E.D. Pa. 1971). The Supreme Court defined primary jurisdiction in *Far Eastern Conference* v. *United States*, 342 U.S. 570, 574-575 (1952):

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of

(Continued from preceding page)

why no violation should be deemed to have occurred. A like period shall be allowed to the complainant, if any, during which he may submit evidence to rebut the evidence offered by the respondent. The Administrator may undertake such further investigation, including, in his discretion, the holding of an evidentiary hearing or hearings.

§ 605.33: (a) After reviewing the results of such investigation, including hearing transcripts, if any, and all evidence submitted by the parties, the Administrator will make a written determination as to whether the respondent has engaged in school bus operations in violation of the terms of the agreement.

(b) If the Administrator determines that there has been a violation of the agreement, he will order such remedial measures as he may deem appropriate.

(c) The determination by the Administrator will include an analysis and explanation of his findings.

§ 605.34: If the Administrator determines, pursuant to this subpart, that there has been a violation of the terms of the agreement, he may bar a grantee or operator from the receipt of further financial assistance for mass transportation facilities and equipment.

§ 605.35: The determination of the Administrator pursuant to this subpart shall be final and conclusive on all parties, but shall be subject to judicial review pursuant to Title 5 U.S.C. §§ 701-706.

FED. REGISTER, Vol. 41, No. 64, 49 C.F.R. §§ 605.30-35 (April 1, 1976).

> administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Accord, Weinberger v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 654 (1973). There is no fixed formula for the invocation of the doctrine of primary jurisdiction and "the decision whether to apply it depends upon a case by case determination of whether, in view of the purposes of the statute involved and the relevance of administrative expertise to the issue at hand, a court ought to defer initially to the administrative agency." *Feliciano* v. *Romney*, 363 F. Supp. 656, 674 (S. D. N. Y. 1973). The policy factors underlying application of the doctrine are: "(1) desirable uniformity which would obtain if a specialized agency initially passed on certain types of administrative questions, . . . and (2) the expert and specialized knowledge of the agencies involved." *Eisman* v. *Pan American World Airlines, supra*, at 547.

After careful consideration of the facts presented by the instant case, we have concluded that the doctrine of primary jurisdiction is applicable. Thus, plaintiffs must exhaust their administrative remedies before a court can review their claim.

The judgment entered below is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 9, 1976
Before
Hon. John S. Hastings, *Senior Circuit Judge*
Hon. Robert A. Sprecher, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*

BRADFORD SCHOOL BUS TRANSIT, INC., *et al.*, *Plaintiffs-Appellants*, vs. CHICAGO TRANSIT AUTHORITY, *et al.*, *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 75 C 694 Frank J. McGarr, *Judge*.
No. 75-1958	

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby DENIED.

Pertinent Provision of the Urban Mass Transportation Act of 1964.

The Urban Mass Transportation Act of 1964 as amended, 49 U. S. C. § 1603(g), reads as follows:

> (g) No Federal financial assistance shall be provided under this chapter for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators. This subsection shall not apply to an applicant with respect to operation of a schoolbus program if the applicant operates a school system in the area to be served and operates a separate and exclusive schoolbus program for this school system. This subsection shall not apply unless private schoolbus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards; and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting schoolchildren and personnel along with families to be used therefor) was so engaged in schoolbus operations any time during the twelve-month period immediately prior to November 26, 1974. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial asistance under this chapter.

Pertinent Provision of the Federal-Aid Highway Act of 1973.

The Federal-Aid Highway Act of 1973, 49 U. S. C. § 1602a (b) provides:

> (b) No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, Title 23, (2) paragraph (4) of subsection (c) or section 103, Title 23, or (3) this chapter, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. This subsection shall not apply to an applicant with respect to operation of a school bus program if the applicant operates a school system in the area to be served and operates a separate and exclusive school bus program for this school system. This subsection shall not apply unless private school bus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards, and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations at any time during the twelve-month period immediately prior to August 13, 1973. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (2), and (3) of this subsection.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-646.

BRADFORD SCHOOL BUS TRANSIT, INC., A CORPORATION, AND THE ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, A NOT FOR PROFIT CORPORATION,

Petitioners,

vs.

THE CHICAGO TRANSIT AUTHORITY, A MUNICIPAL CORPORATION, THE URBAN MASS TRANSPORTATION ADMINISTRATION, AN AGENCY OF THE UNITED STATES OF AMERICA, AND JUDITH T. CONNOR, ADMINISTRATOR OF THE URBAN MASS TRANSPORTATION ADMINISTRATION,

Respondents.

MEMORANDUM FOR RESPONDENT CHICAGO TRANSIT AUTHORITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The sole issue raised by the Petition for Certiorari in this cause is whether the Court of Appeals' decision conflicts with this Court's decision in *Nader* v. *Allegheny Airlines,* ..... U. S. ....., 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976). Contrary to Petitioners' assertion, the doctrine of primary jurisdiction requires judicial deference to the Urban Mass Transportation Administration (UMTA) in this case, because Petitioners' Second Amended Complaint raises technical issues of fact not within the conventional knowledge of federal district courts.

The Court of Appeals held that Petitioners had standing to raise claims for relief under federal mass transit statutes which, under certain circumstances, prohibit school bus operations by federal grant recipients. Section 164(b), Federal Aid Highway Act of 1973, Title 49, U. S. Code § 1602a(b) (hereinafter "164(b)"); Section 3(g) of the Urban Mass Transportation Act of 1964, as amended, Title 49, U. S. Code § 1602(g) (hereinafter "3(g)"). Petitioners claim that the only questions before the district court would be the interpretation of the phrases "school bus operations," "competition" and "shall bar," as used in these statutes, and application of these phrases to alleged school bus operations by the Chicago Transit Authority ("CTA").

In quoting the statutes upon which they rely, Petitioners have omitted the conditions precedent to obligations of grant recipients under the statutes:

> . . . "This subsection shall not apply unless private school-bus operators are able to provide *adequate* transportation, at *reasonable* rates, and *in conformance with applicable safety standards;* and this subsection shall not apply with respect to any State or local public body or agency thereof if it . . . was so *engaged in school bus operations any time* during the twelve-month period immediately prior to the date of the enactment of this subsection." [Emphasis added.]

The above-quoted language appears verbatim in both section 164(b) and section 3(g).[1] Petitioners state that they have omitted the conditions precedent because they were not pertinent to the decision below or to the question in this Court. (Petition, p. 3, fn. 6.) On the contrary, the language omitted by Petitioners provides ample support for the Court of Appeals' deference to the primary jurisdiction of UMTA.

In order to prove any violation of the school bus provisions by the CTA, Petitioners would be required to show that the

1. The full text of both sections is reprinted at the end of this Memorandum.

conditions precedent have been satisfied. Petitioners would be required to demonstrate:

1. that "adequate" transportation is available from private school bus operators;

2. that such transportation is available "at reasonable rates";

3. that such transportation is "in conformance with applicable safety standards"; and

4. that the CTA had not engaged in school bus operations within either of the "grandfather" provisions.

Each of these matters involves technical questions of fact, such as assessment of industry conditions and reasonableness of rates. Such matters are uniquely within the expertise and experience of an administrative agency—in this case, UMTA. *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 66-67 (1956). The determination of these questions also requires uniformity throughout the mass transit industry.

Petitioners' heavy reliance on *Nader* v. *Allegheny Airlines, supra,* is not warranted. In *Nader,* this Court emphasized that plaintiff's lawsuit did not involve technical questions of fact:

> "The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry." [..... U. S. at ....., 96 S. Ct. at 1987-88, 48 L. Ed. 2d at 656.]

The questions of safety, adequacy of service and reasonableness of rates presented by Petitioners' action here are unlike the questions regarding fraudulent misrepresentation in *Nader.* The questions here cannot be judged by standards within the conventional competence of the courts.

Petitioners' action here requires judicial deference to the expertise and experience of UMTA under the doctrine of primary jurisdiction. The Court of Appeals' decision was entirely

consistent with the decisions of this Court relating to primary jurisdiction, including *Nader* v. *Allegheny Arlines, supra.*

We respectfully contend that the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Section 3(g) of the Urban Mass Transportation Act of 1964, as Amended, Title 49, U. S. Code § 1602(g):

(g) No federal financial assistance shall be provided under this Act for the construction or operation of facilities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators. This subsection shall not apply to an applicant with respect to operation of a schoolbus program if the applicant operates a school system in the area to be served and operates a separate and exclusive schoolbus program for this school system. This subsection shall not apply unless private schoolbus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards; and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting schoolchildren and personnel along with facilities to be used therefor) was so engaged in schoolbus operations any time during the twelve-month period immediately prior to the date of the enactment of this subsection. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under this Act.

Section 164(b) of the Federal Aid Highway Act of 1973, Title 49, U. S. Code § 1602a(b):

(b) No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, title 23, United States Code, (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code, or (3) the Urban Mass Transportation Act of 1964, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators. This subsection shall not apply to an applicant with respect to operation of a school bus program if the applicant operates a school system in the area to be served and operates a separate and exclusive school bus program for this school system. This subsection shall not apply unless private school bus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards, and this subsection shall not apply with respect to any State or local public body or agency thereof if it (or a direct predecessor in interest from which it acquired the function of so transporting school children and personnel along with facilities to be used therefor) was so engaged in school bus operations any time during the twelve-month period immediately prior to the date of the enactment of this subsection. A violation of an agreement under this subsection shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (2), and (3) of this subsection.

No. 76-646

In the Supreme Court of the United States

OCTOBER TERM, 1976

BRADFORD SCHOOL BUS TRANSIT, INC., ET AL.,
PETITIONERS

v.

THE CHICAGO TRANSIT AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-646

BRADFORD SCHOOL BUS TRANSIT, INC., ET AL.,
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v.

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners (a private school bus operator and the Illinois School Transportation Association) brought this suit as a class action in the United States District Court for the Northern District of Illinois. They argued that respondent Chicago Transit Authority (CTA) had breached its contract with respondent Urban Mass Transportation Administration (UMTA) and had violated Section 164(b) of the Federal-Aid Highway Act of 1973, 87 Stat. 250, 281, 49 U.S.C. (Supp. V) 1602a(b), and Section 3(g) of the Urban Mass Transportation Act of 1964, as added, 88 Stat. 1572, 49 U.S.C. (Supp. V) 1602(g), by engaging in school bus transportation in competition with private bus operators. Petitioners also contended that UMTA improperly failed to enforce these contractual and statutory provisions.

The district court dismissed the complaint, holding that petitioners lacked standing to sue and that Congress had "clearly committed the decision as to whether a breach has occurred and whether or not to act on that breach to the agency's discretion" (Pet. App. A10-A11). The court of appeals affirmed; it rejected the standing and "committed to agency discretion" arguments but held that the dispute is within the primary jurisdiction of UMTA, to which it should be referred (537 F. 2d 943; Pet. App. A12-A22). The decision of the court of appeals is correct. There is no conflict among the circuits on this issue and no reason for review by this Court.

Last term, in *Nader* v. *Allegheny Airlines, Inc.*, No. 75-455, decided June 7, 1976, this Court thoroughly considered the principles underlying the doctrine of primary jurisdiction. Under *Nader* and earlier cases, an action otherwise within the jurisdiction of the federal courts should be decided first by the responsible federal agency when the issues involved present considerations of "uniformity in regulation" and "technical expertise." *Nader, supra,* slip op. 13. Such considerations are presented here.

This case involves two rather complex provisions of federal transportation law. These provisions require an agency receiving grants from UMTA to enter into an agreement with UMTA not to engage "in competition with private schoolbus operators." 49 U.S.C. (Supp. V) 1602a(b), 1602(g). Both statutes further provide:

> This subsection shall not apply unless private schoolbus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards; and this subsection shall not apply with respect to any State or local public body or agency thereof if it * * * was so

> engaged in schoolbus operations any time during the twelve-month period immediately prior to [the dates of the respective statutes' enactments].

The grant agreement between UMTA and CTA reflects these exceptions to the non-competition clause.

Inquiries concerning the "adequacy" of transportation that could be provided by private bus operators, the "reasonableness" of their rates, their "conformance with applicable safety standards," and the prior engagement of the subsidized agency in "schoolbus operations" should first be made by UMTA in light of its experience. UMTA's preliminary consideration and determination of these issues is likely to result in a more consistent and systematic regulation of the schoolbus operations of subsidized transit agencies than would court decisions made in a vacuum without agency guidance. UMTA therefore should first resolve these matters administratively.

During the pendency of this litigation, but prior to the court of appeals' decision, UMTA promulgated regulations allowing "[a]ny interested party," including private bus operators, to challenge administratively the schoolbus operations of subsidized agencies. 41 Fed. Reg. 14130-14131, adding 49 C.F.R. 605.30-605.35. We are informed that petitioner Bradford School Bus Transit, Inc., has filed an administrative complaint pursuant to these regulations. This complaint raises the same substantive issues involved here. These pending proceedings offer petitioners a full opportunity to obtain a decision by UMTA concerning the challenged CTA operations.[1] If they should be dissatisfied with UMTA's

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[1]Moreover, pursuant to recent UMTA regulations, 41 Fed. Reg. 14129, 49 C.F.R. 605.11, CTA will have to justify any future schoolbus operations, under the applicable statutes, when applying for federal grants.

decision, they then would be free to return to the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

DOJ-1976-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-646

BRADFORD SCHOOL BUS TRANSIT, INC., AND ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, ET AL.,
Petitioners,

vs.

THE CHICAGO TRANSIT AUTHORITY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY AND SUPPLEMENTAL MEMORANDUM FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

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BRADFORD SCHOOL BUS TRANSIT, INC., AND ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY AND SUPPLEMENTAL MEMORANDUM FOR PETITIONERS.

The federal respondents and The Chicago Transit Authority ("CTA") each rely solely upon the same inappropriate rationale in urging this Court to deny the petition. Further, respondents here urge as "issues" various matters which were never pled or raised, either by petitioners or respondents, in the District Court and which were not the basis of the judgment of the Court of Appeals. Respondents' assertion that the doctrine of "primary jurisdiction" is applicable to this case because of alleged questions "concerning the 'adequacy' of transportation that could be provided by private bus operators, the 'reasonableness' of their rates, their 'conformance with applicable safety standards,' and the prior engagement of the subsidized agency in 'schoolbus operations'" (memo for federal respondents, p. 3, memo for

CTA, p. 2) were not the subject of either (1) petitioners' second amended complaint (or any prior pleading), or (2) any pleading filed by the federal respondents or the CTA. Consequently, the response to the petition is based upon matters wholly outside the record.

In the exact same vein is the oblique assertion on behalf of the federal respondents that:

> "We are informed that petitioner Bradford School Bus Transit, Inc., has filed an administrative complaint pursuant to these regulations. This complaint raises the same substantive issues involved here. These pending proceedings offer petitioners a full opportunity to obtain a decision by UMTA concerning the challenged CTA operations. If they should be dissatisfied with UMTA's decision, they then would be free to return to the courts." (memo for federal respondents, p. 3.)

The complaint so referred to was filed in October, 1976, and it dealt with an award of a school bus contract to CTA by the Chicago Board of Education on or about October 13, 1976. That complaint is being prosecuted by four corporations which bid that work as joint venturers. One of those corporations is *one* of the petitioners here. However, petitioner Illinois School Transportation Association is not a party to that proceeding, nor is that proceeding brought on behalf of the class of school bus operators that constitute the class in this case.[1] It approaches arrogance for the government to state, as it does, that that "proceeding" before UMTA might afford Bradford the same relief as that prayed for in the instant case. Among other things, that suggestion ignores the fact that Bradford might well be entitled to an award of compensatory damages below. Additionally, it is somewhat strange for a defendant to dictate to the plaintiffs that they should obtain relief for a wrong that is alleged to have occurred in January, 1975 (Appendix to Petition, pp. A7-A8) on the basis of an alleged wrong in October, 1976.

1. The existence of this "proceeding" was first known to counsel for the petitioners when the government's memorandum was received.

Further, the federal respondents conveniently ignore the fact that the Illinois School Transportation Assocation is a party to this case with an interest to be vindicated here and that it is not and does not intend to be a party to the "proceeding" before UMTA. It would be better that the government face up to the charges in the complaint below rather than suggesting that Bradford somehow obtain the relief there requested through the vehicle of a proceeding that was commenced at least 18 months after the instant case. The government's reliance upon that character of argument, we think, is indicattive of the that character of argument, we think, is indicative of the appropriateness of granting the writ in this case.

To assume at this stage of this case that the asserted questions delineated by respondents, *supra*, p. 1, trigger the application of the doctrine of "primary jurisdiction" is presumptuous. Moreover, the government's explicit suggestion that UMTA presently has administrative "expertise" with respect to such topics is without support in this record or elsewhere. The best evidence of that is the fact that UMTA had not adopted any regulations with respect to such topics until at or about the time this case was argued in the Court of Appeals. The simple fact is that UMTA has not been engaged in regulating or studying school bus operations in the State of Illinois, the safety requirements applicable thereto, or the rates charged for such services. Instead, UMTA has been engaged in distributing federal monies to public mass transportation agencies such as the CTA.

Complementary to respondents' presentation about "primary jurisdiction" is the government's suggestion, at page 2 of its memorandum, that the Court of Appeals referred certain issues to UMTA. No such referral was made; instead, the Court of Appeals affirmed without modification the District Court's order dismissing petitioners complaint with prejudice. For that reason, the respondents' reliance upon certain statements of this Court in *Nader* v. *Allegheny Airlines, Inc.* (memo of federal respondents, p. 2, memo of CTA, p. 3) is at best misplaced, for this

Court was there speaking of the "refer[al] of specific issues to an agency for initial determination" 96 S. Ct. 1978, 1987. Here, no issues have been formulated that can be referred, and in fact there has been no stay of the action pending a referral. Instead, petitioners' complaint has been dismissed with prejudice.

The government's position in this case is at odds with the position it recently assumed in *United States* v. *American Telephone and Telegraph Company, et al.*, No. 74-1698, which is pending in the District Court for the District of Columbia. That case was filed on November 20, 1974, and it is there alleged that AT&T, Western Electric Company, Bell Telephone Laboratories, Inc., and numerous other co-conspirators, conspired to prevent, restrain and eliminate competition in the business of telecommunications and equipment therefor. The breadth of the violations charged and relief requested is evident from the government's press release concerning the commencement of the action. CCH Trade Regulation Reports ¶ 45,074. Apart from typical antitrust relief, the government seeks the divestiture by AT&T of Western Electric, the division of Western Electric into two or more separate, competing companies, and the divestiture by AT&T of its Long Lines Department.

The relevancy of the AT&T case to this petition first became known to counsel for the petitioners, after the filing of the petition, when a news article appeared in the Wall Street Journal on or about November 24, 1976, which reported the district judge's ruling in that case on the question of "primary jurisdiction". For the convenience of the Court, that opinion is reproduced in the supplemental appendix on pages SA 1 through SA 11. That opinion clearly traces the positions of the respective parties on the questions of the exclusive jurisdiction of the FCC over the subject matter of the government's complaint, the alleged implicit repeal of the antitrust laws with respect to the conduct of the defendants, and whether the action was precluded by a prior consent decree. In the course of determining those questions, Judge Waddy, *sua sponte*, raised the question of the

1. See **No. 76-939;** *AT&T* v. *U. S.* filed in this court on January 6, 1977.

applicability of "primary jurisdiction" to the issues raised by the government's complaint and the answer thereto. At the urging of the government,[1] the District Judge held that referral under that doctrine of any issue was premature and that no such referral would be considered until the issues in the case were "more sharply defined through discovery and other proceedings permissable under the Federal Rules of Civil Procedure" (SA 8-10). In short, Judge Waddy completely adopted the government's argument on "primary jurisdiction"—so do the petitioners here.

In *AT&T*, the Department of Justice said:

> "The doctrine of primary jurisdiction applies to claims cognizable by courts when the conduct complained of is also within the special competence of an administrative body. Conversely, it does not apply where such conduct is not within the purview of any regulatory agency." (SA 15.)
>
> * * * * *
>
> " 'No fixed formula exists for applying the doctrine of primary jurisdiction.' *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64 (1956). The issue to be resolved is simply whether the purposes of the doctrine would be served by its application. Primary jurisdiction referrals may allow courts to obtain agency views on threshold jurisdictional issues or to obtain agency expertise and achieve uniformity through judicial accommodation. Primary jurisdiction is thus a discretionary device to assist in the pragmatic problem of allocating responsibility between courts and regulatory agencies, and to allow the courts to take advantage of regulatory expertise.
>
> "Primary jurisdiction referrals are not to be employed casually. They entail expenditures of agency time and effort and they delay the adjudication of the claim before the court. Thus, as the Court in *Western Pacific* pointed out, 'in every case' it is encumbent upon a court to conclude that it must resolve an issue requiring uniformity of approach or agency expertise prior to ordering a primary

1. Extracts from the brief of the Department of Justice in *United States* v. *ATT*, et al. are reproduced in the appendix hereto at pp. SA 12-20.

jurisdiction referral. 352 U. S. at 64. The Supreme Court, recognizing that 'in virtually every suit involving a regulated industry, there is something of value which an administrative agency might contribute if given the opportunity,' *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. at 320, nonetheless has taken pains to emphasize that the propriety of referrals hinges upon their promising to be of 'material aid' or sufficiently 'helpful' to the referring court to warrant the burdens and delays they inevitably entail.

"Last June, in *Nader* v. *Allegheny Airlines, Inc.*, 96 S. Ct. 1978 (1976), the Court reversed a directive by the Court of Appeals for the District of Columbia Circuit that a common law tort action be stayed pending referral of the matter to the Civil Aeronautics Board. It deemed the standards to be applied 'within the conventional competence of the courts,' and declared that 'the judgment of a technically expert body is not likely to be helpful in the application of these standards. . . . *Id.* at 1988.' (SA 15-16.)

* * * * *

"The problems of delay and burden upon the administrative agency as well as the very rationale for the primary jurisdiction mechanism, *i.e.*, uniformity and expertise, counsel that referrals be limited to specific issues. The authorities reflect this. *Nader* v. *Allegheny Airlines*, 96 S. Ct. at 1987 ('[I]t may be appropriate to refer specific issues to an agency. . . .'); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 68 (1970) ('[C]ourts may route the threshold decision as to certain issues to the agency. . . .').

"Prior to making referrals, a court should assure itself that an *agency resolution* of a specific issue is in fact required for the adjudication of the claim before it. *United States* v. *Western Pacific R. Co.*, 352 U. S. at 64." (SA 17-18.)

* * * * *

"It therefore is premature to attempt to carve out of this case specific issues for referral to the FCC. That task, if necessary, must be deferred until discovery reveals more clearly the dimension of defendants' antitrust misconduct and the extent to which it overlaps with unresolved questions of communications law and policy.

"Further, because of problems of procedure, delay, expense, and inflexibility identified with the formal referral process, the Department believes that the Court should seriously consider obtaining the Commission's assistance, should it appear necessary at all, through some less formal means. This could take the form of an invitation to intervene, *see, e.g., Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971); participation as *amicus curiae;* or some other less formal means, *see, e.g., United States* v. *Chicago Bd. of Trade*, 1972 Trade Cas. ¶ 73,831 (N. D. Ill. 1972). *See generally Catholic Medical Center* v. *Rockefeller*, 305 F. Supp. 1256, 1268 (E. D. N. Y. 1969), *aff'd*, 430 F. 2d 1297 (2d Cir.), *appeal dismissed*, 400 U. S. 931 (1970); Jaffe, Judicial Control of Administrative Action 130 (1965)." (SA 18-19.)

What the government told Judge Waddy was true. It is still true. Further, that government submission demonstrates the error below, and it also shows the appropriateness of granting a writ of certiorari in this case.

CONCLUSION.

For the reasons stated, petitioners respectfully pray that this Court's writ of certiorari issue to review and reverse the judgment below.

Respectfully submitted,

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Dated: January 7, 1977.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-646

BRADFORD SCHOOL BUS TRANSIT, INC., and ILLINOIS SCHOOL TRANSPORTATION ASSOCIATION, ET AL.,
Petitioners,

vs.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL APPENDIX.

SUPPLEMENTAL APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the District of Columbia

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants.*	Civil Action No. 74-1698

MEMORANDUM OPINION AND ORDER ON JURISDICTIONAL ISSUES.

I.

This action arises under Sections 2 and 4 of the Sherman Antitrust Act, 15 U. S. C. §§ 2 and 4. Plaintiff is the United States of America, acting through the Department of Justice. Defendants are American Telephone and Telegraph Company (AT&T), Western Electric Company, Inc. (Western Electric), a wholly owned subsidiary of AT&T, and Bell Telephone Laboratories, Inc. (Bell Labs), jointly owned by AT&T and Western Electric.

The complaint broadly alleges that defendants, together with numerous co-conspirators, including 23 named telephone companies owned in whole or in part by AT&T, and their subsidiaries (Bell Operating Companies), have engaged in an unlawful combination and conspiracy to monopolize, have attempted to monopolize and have monopolized certain interstate

trade and commerce in telecommunications equipment and submarkets thereof. Plaintiff seeks declaratory and injunctive relief, including complete divestiture of Western Electric by AT&T, divestiture by Western Electric of some of its manufacturing and other assets, and divestiture by AT&T of some or all of its "Long Lines Department" from some or all of the Bell Operating Companies.

The defendants did not move to dismiss the complaint but in their answer to the complaint, they alleged the following affirmative defenses: (1) plaintiff fails to state a claim upon which relief can be granted; (2) the Court lacks subject matter jurisdiction; and (3) the matters sought to be litigated herein were previously litigated in a suit between the parties brought in 1949 in the United States District Court for the District of New Jersey, Civil Action No. 17-49, making the the issues herein *res judicata*, and (4) that in the 1956 consent decree terminating Civil Action No. 17-49, the District Court of New Jersey retained exclusive jurisdiction to modify or terminate that decree.[1]

At a hearing on discovery motions held February 20, 1975, the Court indicated its concern over whether the jurisdictional defenses raised in the answer to the complaint were threshold matters which should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties. The Court then *sua sponte* stayed discovery pending its determination of the jurisdictional questions.

Following extensive briefing and a hearing on July 23, 1975, the Court, on August 5, 1975, invited the Federal Communications Commission (Commission) to participate as *amicus curiae*. The Commission accepted the Court's invitation, submitting an *amicus curiae* brief addressing the jurisdictional issues. Subsequent to the Commission's submission, supplemental memoranda were filed by the Department of Justice and the defendants.

1. By Order dated October 1, 1976, this Court determined: (1) that this action is not barred by the doctrine of *res judicata* because of Civil Action No. 17-49 in the United States District Court for the District of New Jersey; and (2) that the consent decree entered in Civil Action No. 17-49 does not require this Court to relinquish jurisdiction to the New Jersey Court.

Meanwhile, the Commission was engaged in various proceedings and made certain determinations which, it appeared to the Court, embraced some of the same 30 alleged actions and practices pinpointed in Addendum B to the Commission's *amicus* memorandum which it viewed as the basis of plaintiff's Sherman Act monopolization charges.

In light of the *amicus* submissions, and the recent proceedings and determinations by the Commission, the Court, by Order dated October 1, 1976, ordered a further hearing on whether the Federal Commissions Act of 1934, 47 U. S. C. § 151, *et seq.* (the Communications Act), and the regulations promulgated pursuant thereto, compelled the conclusion that there was an implied repeal of the antitrust laws. Also included, of necessity, was further consideration of the extent to which exclusive jurisdiction rested with the Commission, and whether and to what extent the doctrine of primary jurisdiction should be invoked. Supplemental memoranda were filed by the parties and the Commission, and a hearing held November 16, 1976.

Briefly stated, defendants contend they enjoy implied immunity from antitrust liability because they are subject to a pervasive scheme of regulation imposed by the Federal Communications Act and state regulatory statutes. They contend that this pervasive regulatory scheme, based as it is upon the public interest standard, is flatly inconsistent with the competition standards underlying antitrust law. With respect to the question of primary jurisdiction, defendants contend that because the Court has no antitrust jurisdiction herein, the question of primary jurisdiction cannot arise, and would not be an appropriate exercise of discretion in this case. Recent Commission decisions, they assert, represent primarily attempts by the

Commission to control anticompetitive behavior initiated by defendants through tariff filings.

Plaintiff contends that Congressional intent is the standard to be applied, and that in this case, neither an express nor an implied immunity from antitrust liability was intended nor exists. Plaintiff sees absolutely no irreconcilable conflict arising under the Commissions Act and the Sherman Act, and contends that the Commission's regulations and recent decisions in proceedings do not in any way affect the statutory scheme, or the antitrust jurisdiction of this Court.

The Commission, as *amicus*, finds no blanket immunity from antitrust liability. It does, however, assert that the following three areas are impliedly delegated to the Commission's exclusive jurisdiction which antitrust courts should not disturb by *ad hoc* rulings: (1) in view of Section 214 of the Act, only the Commission may require, through its certification process, entry into or exit from a communications common carrier market; (2) in view of Section 201 of the Act, antitrust courts should not countermand Commission orders requiring carriers to interconnect their telephone systems; and (3) in view of Section 205 of the Act, courts should not base antitrust relief or remedies upon tariff provisions or conduct pursuant to tariff provisions which the Commission has either "approved or prescribed" after the required investigation.

The Commission urges the Court to refer unsettled issues which may substantially affect the Commission's regulatory policies to the Commission under the doctrine of primary jurisdiction and to take judicial notice where the Commission has settled such questions, so as to reconcile the regulatory scheme and the scheme of the antitrust laws.

II.

The Federal Communications Act of 1934 contains no express statement of immunity and defendants do not claim the

Act expressly exempts them from the antitrust laws. Therefore, immunity, if it exists, must be implied from the statutory scheme and the regulatory powers exercised by the Commission.

When faced with implied immunity questions, the courts have undertaken a case-by-case approach which analyzes the particular industry, the appliable regulatory scheme and procedures. and the statutory history to determine whether operation of the antitrust laws can be reconciled with the regulatory scheme. Where reconciliation cannot be achieved, the antitrust laws must give way.

When Congress passed the Communications Act in 1934, it was well aware of the dominance of AT&T of the telecommunications industry inasmuch as AT&T *was* the telecommunications industry.[2] Provisions of older interstate commerce acts were retained, and new provisions incorporated. The stated purpose of the Communications Act is

> ". . . to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . ." 47 U. S. C. § 151.

Common carriers are regulated under Title II of the Communications Act, 47 U. S. C. §§ 201-223. The Commission summarizes its mission with respect to common carriers as follows: "(1) to create and maintain a rapid, efficient communications network; (2) to ensure that adequate facilities are provided for the network; and (3) to require the provision of service pursuant to tariffs offering just and reasonable rates, practices, procedures and regulations."[3] Additionally, the Commission has been granted remedial powers sufficient to ensure compliance with its mandate.

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2. Emphasis added.

3. Memorandum of Federal Communications Commission as *Amicus Curiae*, at 8.

Title II of the Communications Act creates a scheme embodying extensive regulatory control. *United States* v. *Radio Corporation of America*, 358 U. S. 334, 349 (1959). However, nothing in the history of federal regulation of the telecommunications industry, beginning with the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, and the Willis-Graham Act of 1921, 42 Stat. 27, and continuing through the Communications Act of 1934, including its legislative history, compels the conclusion that Congress envisioned immunity from antitrust liability.

Such immunity may, however, still be implied if an irreconcilable conflict between the regulatory statute and the antitrust laws exists. It is upon this theory that defendants chiefly rely. In their view, pervasive regulation by federal and state agencies automatically confers antitrust immunity. Alternative grounds supporting their contention of immunity are based on asserted inconsistent standards embodied within the regulatory scheme and antitrust laws.

The Supreme Court has addressed the issue of implied immunity from antitrust laws on a number of occasions. At the heart of each of the Supreme Court's decisions involving implied immunity from antitrust laws is a strong disfavor to find that the regulatory scheme completely displaces antitrust laws. *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines*, 409 U. S. 363 (1973). This basic principle is particularly true where commercial relationships "are governed in the first instance by business judgment and not regulatory coercion." *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 374 (1973).

The *Otter Tail* Court held that the power company, although subject to extensive regulation by the Federal Power Commission, was not immune from antitrust action under Section 2 of the Sherman Act. Quoting from *United States* v. *Philadelphia*

National Bank, 374 U. S. 321, 350-51 (1973), the Court emphasized that

> "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust provisions and regulatory provisions." *Otter Tail Power Co.* v. *United States, supra* at 372.

The Court then went on to observe that "activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.*

It is true that a regulatory scheme may be so pervasive that it must displace the antitrust laws in particular and discrete instances. *United States* v. *National Association of Securities Dealers, Inc.*, 422 U. S. 694, 735 (1975). In each instance, however, the concern has been whether different and potentially conflicting standards with respect to particularized activities and conduct may result, thereby threatening the agency's ability to carry-out its regulatory mandate. Immunity is to be implied only where it is necessary to make the regulatory statutes work, and even then only to the minimum extent necessary. *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963).

These basic axioms of construction were recently reaffirmed in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 682-683 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

Merely because Congress has authorized the Commission to regulate the telecommunications industry (even assuming that regulation is viewed as being pervasive) does not automatically necessitate the conclusion that the antitrust laws are to be displaced. As Mr. Justice Harlan observed in his concurring opinion in *United States* v. *Radio Corporation of America, supra* at 353:

> ". . . a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding

> adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, . . ."

The Court therefore concludes that the Communications Act does not expressly, or impliedly, repeal the antitrust laws. Neither the language, nor the legislative history of the Communications Act supports the conclusion that Congress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission.

The Court further concludes that neither the Act, nor the regulations promulgated pursuant thereto, nor the recent proceedings and determinations by the Commission necessitate or support the conclusion that there has been an implied repeal of the antitrust laws with respect to all of the conduct of defendants embraced within the complaint. The Court is satisfied that it has antitrust jurisdiction of at least some of the aspects of the case.

III.

Having determined the defendants are not completely immune from the antitrust laws, the Court turns next to the applicability of referral to the Commission under the doctrine of primary jurisdiction.

Primary jurisdiction issues arise in antitrust litigation where, as here, "conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289, 299-300 (1973).

The procedure typically followed is for the antitrust court to refer preliminary factual and legal questions to the agency while retaining ultimate jurisdiction and "the final authority to expound the statute." *Ricci, supra* at 305, quoting from

Federal Maritime Board v. *Isbrandtsen, Co.,* 356 U. S. 481, 498 (1958). The question of immunity, of couse, is not before the agency.

This "prior resort" approach is grounded on the necessity for administrative uniformity and the need for administrative skills found within the appropriate body of experts in handling intricate facts, *United States* v. *Radio Corporation of America, supra* at 346, and grows out of the need to resolve possible conflicts between the antitrust policy of free competition and the regulatory standards. In this case, the regulatory standard is the public interest, convenience and necessity. 47 U. S. C. § 201, 214. However, competition is, without a doubt, a factor to be weighed in determining where the public interest lies. *Hawaiian Telephone Company* v. *F. C. C.,* 498 F. 2d 771, 776 (D. C. Cir. 1974).

Referrals have been used in the past in antitrust suits dealing with communications common carriers as the means of accomodating the overlapping jurisdiction.[4] See, *e.g., United States* v. *Radio Corporation of America, supra; Carter* v. *AT&T,* 365 F. 2d 486 (5th Cir. 1966); *Chastain* v. *AT& T,* 401 F. Supp. 151 (D. D. C. 1975).

As Judge Gasch observed in the *Chastain* case:

> "The purpose of referrals to regulatory agencies pursuant to the doctrine of primary jurisdiction is simply to give the relevant regulatory agency the opportunity to determine the reasonableness and validity of the challenged practice under the regulatory scheme before the Court determines the reasonableness and validity of the practice under the antitrust laws. In this way the primary jurisdiction doctrine seeks to prevent 'sporadic action by federal courts . . . [from] disrupt[ing] an agency's delicate regulatory scheme.'" *Chastain* v. *AT&T, supra* at 157, quoting from

4. The Commission has encouraged the Court to utilize the procedure by means of a precise referral order calling upon the agency to address specific questions under the Communications Act. Supplemental Memorandum of F. C. C. as *Amicus Curiae,* at 5.

United States v. *Radio Corporation of America, supra* at 348.

Moreover, when certain basic communications issues arise in antitrust proceedings, the regulatory scheme prescribed in Title II of the Communications Act for common carriers would seemingly make referral to the Federal Communications Commission imperative. *Carter* v. *AT&T, supra* at 498-499.

Accordingly, it appears to the Court, based upon all of the matters that have come before it, including recent Commission activities, that some—or much—of the conduct and practices of defendants upon which plaintiff bases its charges of conspiracy to monopolize, attempts to monopolize and monopolization might well be subject to the doctrine of primary jurisdiction. The Court, in its discretion, will in the future, consider referring particular issues to the Commission at the appropriate time. At this stage in the proceedings, however, the issues must be more sharply defined through discovery and other proceedings permissible under the Federal Rules of Civil Procedure.

IV.

Defendants, in their answer to the complaint, asserted that the complaint fails to state a claim upon which relief can be granted. With respect to the argument that the complaint is vague, the Court agrees that it is vague. However, the failure of the complaint to set forth specific acts to support its general allegations of antitrust jurisdiction is not sufficient grounds for dismissal since the Federal Rules of Civil Procedure do not require a complainant to set out in detail all of the facts upon which he bases complaint. *Conley* v. *Gibson,* 355 U. S. 41 (1957).

The Rules also provide for a more definite statement, discovery proceedings, depositions, and other pretrial procedures, all of which can add content to the complaint. The Court notes that already allegations of more specific conduct and activity on the

part of defendants have surfaced in plaintiff's various memoranda.

V.

In summary, inasmuch as neither party has made a motion raising the jurisdictional issues, the Court, *sua sponte,* finds and orders: (1) that defendants do not have blanket immunity from antitrust liability, either expressly or by implication; (2) that the Court has antitrust jurisdiction in this case; and (3) that should it become necessary in the course of these proceedings, the Court will consider the appropriateness of referring certain issues to the Federal Communications Commission under the doctrine of primary jurisdiction.

These determinations and orders shall govern the future course of this litigation unless subsequently changed by order of the Court.

/s/ JOSEPH C. WADDY,
Joseph C. Waddy,
United States District Judge.

Dated: November 24, 1976.

UNITED STATES DISTRICT COURT
For the District of Columbia.

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants.*	Civil Action No. 74-1698

SUPPLEMENTAL MEMORANDUM OF THE DEPARTMENT OF JUSTICE.

I. INTRODUCTION.

On October 1, 1976 the Court issued a *Memorandum and Order* resolving two of the three jurisdictional questions pending in this matter. The Court set for further hearing the question of whether there is "an implied repeal of the antitrust laws with regard to any or all of the conduct alleged in the Complaint." The Court also set for argument the question, in the event that the FCC does not have exclusive jurisdiction, "whether the Court should refer the complaint to the FCC under the doctrine of primary jurisdiction." Finally, the Court invited the parties to submit supplemental memoranda on "whether, and if so how, the recent decisions and proceedings of the Federal Communications Commission affect the jurisdictional issues posed above." Plaintiff takes this opportunity to comment upon the effect of these recent decisions, as well as certain recent judicial decisions bearing upon these issues.

II. SUMMARY OF ARGUMENT.

A. *Exclusive Jurisdiction.*

To dismiss an antitrust suit on the basis of jurisdiction in a federal regulatory agency, a federal district court must assay the regulatory statute and legislative history to determine whether Congress intended the antitrust laws to be supplanted by regulation. Such repeals of the antitrust laws are not lightly implied, and are appropriate only if necessary to make the particular regulatory act work. Obviously, recent actions of the Federal Communications Commission do not change the Communications Act or its legislative history, nor do they contain any heretofore unrevealed insights into whether antitrust immunity for these defendants is necessary to make the Communications Act work.

Recent Commission decisions and proceedings indicate that the FCC is investigating a variety of practices over which it has jurisdiction. Since its founding, the Federal Communications Commission has been involved in many proceedings concerning the industries it regulates. But the jurisdiction of federal courts to entertain antitrust litigation against corporations subject in part to that regulation cannot and does not depend on the state of the Commission's docket at one point in time. Regulation per se does not create antitrust immunity, and there is no indication in these decisions that antitrust immunity is necessary to make the Communications Act work. To the extent recent Commission proceedings are relevant to the jurisdictional issue at hand, they show that even in those areas of conduct which are subject to regulation by the FCC, defendants retain freedom of action too substantial to permit an inference that Congress intended to repeal the antitrust laws.

Finally, while the Commission's recent decisions reflect its attempts to regulate numerous anticompetitive practices of AT&T under the Communications Act, they also demonstrate its

lack of jurisdiction over the conduct of Western Electric and Bell Labs and much of the conduct of AT&T and the Bell operating companies.[1] As described herein, these activities encompass a large proportion of the evidence plaintiff intends to introduce at trial in this litigation.

B. *Primary Jurisdiction Referrals.*

In an effort to accommodate the dual interests of antitrust enforcement and effective regulation, some antitrust courts have, under the doctrine of primary jurisdiction, referred specific issues to regulatory agencies. In the instant litigation, the Department of Justice has alleged a wide range of conduct that together constitutes a violation of the Sherman Act. Much of this conduct is either unregulated or has already been passed upon by the Commission. Although primary jurisdiction referrals of specific issues may be appropriate at some future point, an attempt to identify these issues at this time, prior to discovery, is premature. (Brief of Department of Justice filed November 1, 1976, pp. 1-3)

III. ARGUMENT.

* * * * * *

B. *Primary Jurisdiction.*

The recent decisions of the Federal Communications Commission demonstrate that none of the issues bearing upon defendants' antitrust liability now require referral to the Commission. While defendants have overstated the matter in arguing that

1. The FCC only regulates interstate telecommunications. Approximately half of AT&T's and the Bell operating companies' revenues derive from *intratstate* services, which are regulated, in various ways, by state regulatory commissions. Defendants have claimed that their activities are immune under the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943). The Court has not asked, and we have not provided, further discussion of this issue.

"the doctrine of primary jurisdiction is totally inappropiate in this case,"[20] the very nature of the case—an encompassing examination of defendants' historical conduct toward actual and potential competitors and the intent underlying that conduct—suggests that no liability issues presently are ripe for referral, and that the Commission's continuing consideration and disposition of important telecommunications issues in the discharge of its own responsibilities under the Communications Act may well obviate the necessity for any such referrals.

The doctrine of primary jurisdiction applies to claims cognizable by courts when the conduct complained of is also within the special competence of an administrative body. Conversely, it does not apply where such conduct is not within the purview of any regulatory agency. Here, the conduct complained of is mixed; the Department has alleged as part of its Sherman Act case conduct clearly regulated by the FCC, and conduct clearly not regulated by the FCC.

"No fixed formula exists for applying the doctrine of primary jurisdiction." *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64 (1956). The issue to be resolved is simply whether the purposes of the doctrine would be served by its application. Primary jurisdiction referrals may allow courts to obtain agency views on threshold jurisdictional issues or to obtain agency expertise and achieve uniformity through judicial accommodation. Primary jurisdiction is thus a discretionary device[21] to assist in the pragmatic problem of allocating responsibility between courts and regulatory agencies, and to allow the courts to take advantage of regulatory expertise.

Primary jurisdiction referrals are not to be employed casually. They entail expenditures of agency time and effort and they delay the adjudication of the claim before the court. Thus, as

20. Opening Brief for Defendants at 65.

21. *See Natural Resources Defense Council, Inc.* v. *Morton*, 388 F. Supp. 829, 836 n.12 (D. D. C. 1974).

the Court in *Western Pacific* pointed out, "in every case" it is encumbent upon a court to conclude that it must resolve an issue requiring uniformity of approach or agency expertise prior to ordering a primary jurisdiction referral. 352 U. S. at 64. The Supreme Court, recognizing that "in virtually every suit involving a regulated industry, there is something of value which an administrative agency might contribute if given the opportunity," *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. at 320,[22] nonetheless has taken pains to emphasize that the propriety of referrals hinges upon their promising to be of "material aid" or sufficiently "helpful" to the referring court to warrant the burdens and delays they inevitably entail.[23]

Last June, in *Nader* v. *Allegheny Airlines, Inc.*, 96 S. Ct. 1978 (1976), the Court reversed a directive by the Court of Appeals for the District of Columbia Circuit that a common law tort action be stayed pending referral of the matter to the Civil Aeronautics Board. It deemed the standards to be applied "within the conventional competence of the courts," and declared that "the judgment of a technically expert body is not likely to be helpful in the application of these standards. . . ." *Id.* at 1988. Here, of course, it is the federal court and not the administrative agency which is the repository of antitrust expertise. *Thill Securities* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971).

More recently, the recognition that "the laudable goal of 'judicial accommodation' would become a nightmare of judicial paralysis" if primary jurisdiction referrals to state and municipal agencies were allowed to stand led the Fifth Circuit to over-

22. Dissenting Opinion of Marshall, J.

23. In an effort to minimize these problems, some courts have limited the agency's time to respond. *Macom Products Corp.* v. *American Tel. & Tel. Co.*, 359 F. Supp. 973, 978 (C. D. Cal. 1973); *Monsanto Co.* v. *United Gas Pipe Line Co.*, 360 F. Supp. 1054, 1057 (D. D. C. 1973).

turn a referral order obtained by an AT&T operating company, *Litton Systems, Inc.* v. *Southwestern Bell Tel. Co.*, 539 F. 2d 418 (5th Cir. 1976). In this suit Litton Systems, a manufacturer and marketer of terminal equipment, accused Southwestern Bell of violating the Sherman Act by engaging in tying arrangements and predatory pricing. In measuring the propriety of the referrals sought by Southwestern Bell, Judge Wisdom showed an appropriate concern for the problem of delay. "Bell's effort to seek prior recourse at this stage is not designed to clarify the purpose of such [regulatory] policy nor the need for the arrangement to effectuate that policy; its effect is to serve as a delaying action." *Id.* at 424. Taking cognizance of both the delay problem and the fact that the defendant had not converted its conduct to that of its regulators by merely filing tariffs, Judge Wisdom held that "[a] direction of prior reference here would seriously impair the ability of the district court to enforce federal antitrust policy without providing sufficient countervailing benefits." *Id.* The lack of countervailing benefits sufficient to warrant upholding the referrals was found despite the court's acknowledgement of the agencies' expertise.

> The agencies may, as Bell suggests, be able to call upon expert advice and counsel and may have broad investigatory powers that would aid a court in deciding the antitrust issues. But it can hardly be argued that the court would be incapacitated in the absence of such assistance. In non-regulated industries, a court must be able to decide difficult accounting and economic issues in determining a product was predatorily priced. *Id.* at 424-25 n. 16.

The problems of delay and burden upon the administrative agency as well as the very rationale for the primary jurisdiction mechanism, *i.e.*, uniformity and expertise, counsel that referrals be limited to specific issues. The authorities reflect this. *Nader* v. *Allegheny Airlines*, 96 S. Ct. at 1987 ("[I]t may be appropriate to refer specific issues to an agency. . . ."); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Trans-*

atlantic, 400 U. S. 62, 68 (1970) ("[C]ourts may route the threshold decision as to certain issues to the agency. . . .").

Prior to making referrals, a court should assure itself that an *agency resolution* of a specific issue is in fact required for the adjudication of the claim before it. *United States* v. *Western Pacific R. Co.*, 352 U. S. at 64. Where the regulatory agency has made its views known, primary jurisdiction referrals are unnecessary. "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it." *United States* v. *Western Pacific R. Co.*, 352 U. S. at 69.[23]

Thus, the Commission's recent decisions, as well as earlier ones in the same vein, diminish considerably the likelihood that liability referrals will be necessary. Since many of defendants' anticompetitive practices have been expelled from their tariffs on regulatory grounds, there is no need to refer them to the Commission for purposes of accommodation. In addition, the decisions give this Court the advantage of the Commission's expert views on many of the key issues raised by the Department's Complaint.

At present the Department perceives no liability issues requiring referral. However, the Department cannot responsibly say that liability issues warranting referrals will not arise. Discovery may well make us aware of some. But since the liability aspect of this prosecution has an historical focus, the efforts of the FCC to date have foreclosed many of the questions which, absent such efforts, might have been proper subjects for referral.

23. *See also Locust Cartage Co.* v. *Transamerica Freight Lines, Inc.*, 430 F. 2d 334 (1st Cir.), *cert. denied*, 400 U. S. 964 (1970); *Strickland Transp. Co.* v. *United States*, 334 F. 2d 172 (5th Cir. 1964); *Agar Food Products Co.* v. *Chicago River & Ind. R. Co.*, 358 F. Supp. 1312, 1313 (N. D. Ill. 1973), *aff'd*, 529 F. 2d 529 (7th Cir. 1976); *Schwarz* v. *Bowman*, 244 F. Supp. 51 (S. D. N. Y. 1965), *aff'd mem., Annenberg* v. *Alleghany Corp.*, 360 F. 2d 211 (2d Cir.), *cert. denied*, 385 U. S. 921 (1966).

Further, the continuing efforts of the Commission may well obviate the need for referral of presently unrecognized issues critical to the issue of liability.

It therefore is premature to attempt to carve out of this case specific issues for referral to the FCC. That task, if necessary, must be deferred until discovery reveals more clearly the dimension of defendants' antitrust misconduct and the extent to which it overlaps with unresolved questions of communications law and policy.

Further, because of problems of procedure, delay, expense, and inflexibility identified with the formal referral process, the Department believes that the Court should seriously consider obtaining the Commission's assistance, should it appear necessary at all, through some less formal means. This could take the form of an invitation to intervene, *see, e.g., Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971); participation as *amicus curiae;* or some other less formal means, *see, e.g., United States* v. *Chicago Bd. of Trade*, 1972 Trade Cas. ¶ 73,831 (N. D. Ill. 1972). *See generally Catholic Medical Center* v. *Rockefeller*, 305 F. Supp. 1256, 1268 (E. D. N. Y. 1969), *aff'd*, 430 F. 2d 1297 (2d Cir.), *appeal dismissed*, 400 U. S. 931 (1970); Jaffe, Judicial Control of Administrative Action 130 (1965).

IV. CONCLUSION.

For the foregoing reasons, the Court should rule that there is no implied immunity for any of the conduct alleged in the complaint, and withhold any referral to the Federal Communications Commission under the doctrine of primary jurisdiction.

Respectfully submitted,

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Date: November 1, 1976.

(Brief of Department of Justice filed November 1, 1976, pp. 21-27).